No. 21883

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC.,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANT'S REPLY BRIEF.

SHEPPARD, MULLIN, RICHTER & HAMPTON,
DAVID A. MADDUX,
458 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Appellant British Auto Parts, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Statutes

No. 21883

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC.,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

THE EXCELSIOR UNDERWEAR RULE AS APPLIED TO THE FACTS OF THIS CASE IS INVALID.

A. None of the Reasons for the Rule Exist With Respect to This Case.

Appellee Board seeks to justify its *per se* application of the rule of its *Excelsior Underwear*[1] decision to the instant case by a recital of the reasons for the rule articulated by it in the *Excelsior Underwear* decision.

The outstanding fallacy with this argument is that none of the articulated reasons for the rule exist with respect to the instant case.

Thus, in this small voting unit of just eight employees, the union organizers had free access to the employer's premises where they personally communicated

---

[1]156 N.L.R.B. 1236 (1966).

with all of the Appellant's employees; they had the opportunity to deliver written literature to each employee; there is no evidence that the Appellant took advantage of its knowledge of their names and addresses to communicate by mail with its employees.

Other facts are equally significant. Under the Board's established procedures, the union had to have signed authorization cards from at least three of appellant's employees before an election could be conducted.[2] Authorization cards normally provide for the filling in of an employee's name and address.[3] It is inconceivable that a union could have the names and addresses of three of eight employees and be unable to obtain them for the remaining five.

Finally, it should be noted that no claim was ever made by the union or the Board to the effect that not being furnished with addresses in this case offered even the slightest hindrance to the union in telling its side of the story to the employees. Thus, the Board cannot justify its *per se* application of the *Excelsior* rule to this case, without so much as even granting a hearing to determine if the facts warranted its application, upon the reasons for the *Excelsior* rule because, they *simply don't exist here.*

B. The Board's Authority to Enact Rules Does Not Sanction Its Interference With Constitutional Rights.

The Board has cited *N.L.R.B. v. A.J. Tower Company,* 329 U.S. 324, 330-331 (1946) for the proposition that it has broad authority to establish rules for the fair conduct of elections. Appellant does not con-

---

[2]National Labor Relations Board Rules and Regulations, Statements of Procedure, §101.18.

[3]See form of authorization card in *Pizza Products Corp. v. N.L.R.B.,* 369 F. 2d 431 (6th Cir. 1966).

tend to the contrary. Appellant does contend that where a Board established rule interferes with an employer's or employee's constitutional rights it is invalid.

Perhaps the best example of such an invalid rule is found in the early attempts of the Board to impose almost complete neutrality upon the employer during a union organizing drive. The courts found no difficulty in holding that these efforts to silence employers from expressing to their employees their opposition to unions constituted a denial of the employer's free speech. *N.L.R.B. v. Virginia Electric & Power Company,* 314 U.S. 469 (1939); *N.L.R.B. v. Ford Motor Company,* 114 F. 2d 905 (6th Cir. 1940).

Likewise, since the Board's *Excelsior Rule* as applied to the facts of this case infringes upon the constitutional rights of appellant and its employees[4] it is *invalid.*

1. None of the Other Cases Considering the Excelsior Rule Are in Point.

Although the Courts of Appeal for the Fourth and Seventh Circuits have upheld the validity of the Board's *Excelsior* rule in *N.L.R.B. v. Hanes Hosiery Division, Hanes Corporation,* 384 F. 2d 188 (4th Cir. 1967) *cert. den.* ..... U.S. ..... (1968) and *N.L.R.B. v. Rohlen,* 385 F. 2d 52 (7th Cir. 1967), those decisions, even if correct as applied to the facts there considered, have no application to the instant case. This is so for a number of obvious reasons:

1. In neither *Hanes* nor *Rohlen* did the employers have a policy of confidentiality with respect to divulging employees' addresses;

2. In neither *Hanes* nor *Rohlen* were there contracts between employee and employer providing

[4]Pages 20-29, Appellant's Opening Brief.

for non-disclosure of employees' names and addresses;

3. In neither *Hanes* nor *Rohlen* were union organizers given free access to the employers' premises;

4. In *Hanes* there were approximately 4,000 eligible voters and in *Rohlen* approximately 613 eligible voters, while here there were eight;

5. In neither *Hanes* nor *Rohlen* were the employees given the opportunity to exercise their own free choice as to whether or not they wanted to provide their names and addresses to the union. In the instant case *each employee* was provided with properly addressed and posted envelopes and forms for their purpose and all but two employees manifested their desire *not* to provide their address to the union;

6. In *Rohlen* the employer took advantage of having the addresses of its employees to mail written communication to them; whereas there is no evidence that Appellant did so in the instant case.

These six fundamental differences which separate the instant case from *Hanes* and *Rohlen* present sound reasons why their holdings as to the validity of the *Excelsior* rule have no application whatever to the instant case.

Swift & Company v. Solien, 274 F. Supp. 953 (E.D. Mo. 1967) and *N.L.R.B. v. Wolverine Industries Division, Mid-State Metal Products, Inc.,* 64 LRRM 2060 (N.D. Mich. 1966), relied by Appellee[5] offer no real support for its position in this case for several reasons.

---

[5]Pages 11, 12, Appellee's Brief. *Contra:* see *N.L.R.B. v. Wilson,* 335 F. 2d 449, 452 (5th Cir. 1964) (sustaining a district court's refusal to order an employer to provide the Board with a list of names and addresses of laid off employees.)

The most compelling reason is that in neither of those cases were the employees given the free choice of whether they wanted their wives and families to be bothered by union organizers, and in neither case did the employees plainly manifest their desire not to be bothered, as they did here.

Indeed, as pointed out by the court in *Swift & Company v. Solien, supra:*

> "The employees may well have such a right (as by voluntarily closing their eyes, ears and doors to proffered information), but the choice of whether to exercise that right should be *theirs,* not the employer's." (274 F. Supp. at 958.) (Emphasis added.)

In the instant case the *employees* exercised *their* right to be free from union harassment by declining to furnish their addresses to the union.[6] "The right should be *theirs.*" Neither the N.L.R.B. nor this court should force unwanted intruders upon the employees, their families and home life in the face of their clear choice *not to be bothered.*

2. There Is No Justification Whatever for Destroying the Appellant's and Its Employee's Contract Rights.

In its opening brief Appellant has pointed out that valid contracts exist between it and its employees providing for the non-disclosure of the addresses of its employees. Appellant has further pointed out that the Board's attempted application of its *Excelsior* rule in the face of these contracts violates its constitutional

---

[6]Appellee's suggestion that the employees may have failed to send in their addresses for "fear of employer reprisal" (Page 11, Appellee's Brief) is sheer nonsense in view of the plain fact that there was no possible way for the Appellant to learn who sent in their addresses.

rights and the constitutional and statutory rights of its employees.[7]

Appellee first seeks to avoid the force of these agreements by suggesting that no valid agreements exist.[8] At no time did Appellee ever contest the validity of the contracts of non-disclosure before the District Court. Appellee attempts to raise it for the first time here. This attempt is clearly disposed of by *Carr v. City of Anchorage,* 243 F. 2d 482 (9th Cir. 1957) where the court stated:

> "Appellee urges for the first time in this court that the contract is unenforceable, since it was not let on competitive bidding in the manner provided by §§111 and 112 of Article II of the Anchorage General Code of Ordinances. Since this contention was not urged in the trial court, we need not consider it here. *Hebets v. Scott,* 9th Cir., 152 F. 2d 739." (243 F. 2d at 484.)

Next, Appellee suggests that ". . . it is clear that the company lacks sufficient standing to champion such a right in its 'employees' behalf."[9] This assertion is completely baseless for the following reasons:

1. It ignores the standing of Appellant to assert its *own* contract rights;

2. It completely misinterprets the holding of *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958). In holding that the N.A.A.C.P. had standing to assert the rights of its members, the court reasoned that to hold otherwise "would result in nullification of the right at the very moment of its assertion." In the instant case Appellant's employees

---

[7]Pages 20-31, Appellant's Opening Brief.

[8]Page 14, Appellee's Brief.

[9]Page 14, Appellee's Brief.

asserted their rights to be left alone by refraining from providing their addresses to the union. To force them to now seek to intervene in these proceedings[10] to reaffirm their position necessarily "would result in nullification of the right at the very moment of its assertion." Thus, *N.A.A.C.P. v. Alabama* is direct authority for the standing of Appellant to assert its employees' constitutional rights.

Finally, Appellee glibly asserts that the constitutionally protected contract rights of Appellant must give way to the Board's *Excelsior* rule. Yet, as was thoroughly discussed in Appellant's opening brief, an employer's constitutionally protected property rights will *never* be required to yield to the rights of outside union organizers where alternative means of communication are available. *N.L.R.B. v. Babcock & Wilcox Company,* 351 U.S. 105 (1956).

3. Appellee Offers No Justification for Invading the Employees' Statutory Rights.

As clearly pointed out in Appellant's opening brief, its employees were provided with the opportunity to *easily* and *secretly* provide the union with their names and addresses. They exercised their free choice to *refrain* from furnishing them. They thus exercised their right to *refrain* from union activity which is protected by Section 7 of the Act.

Appellee argues that a failure of an employee to provide the union with his name and address is not an exercise of a Section 7 right by quoting a portion of its

---

[10]With its practical impossibility, in view of the costs involved; and the likelihood that in so doing they would be deposed and their addresses thus exposed.

own *Excelsior* decision. Not only is the view expressed in the quoted portion of the *Excelsior* decision[11] wrong,[12] but it has no application to the facts of this case where, unlike *Excelsior,* Appellant's employees *were provided with the means to easily and secretly provide their address to the union.*

In *Herman Brothers Pet Supply, Inc. v. N.L.R.B.,* 360 F. 2d 176 (6th Cir. 1966) the court sustained the quashing of a subpoena calling for State Unemployment Insurance records on the grounds of a state policy of secrecy. The right of an individual seeking to be left alone should never be inferior to an abstract policy of secrecy of a state agency.

II.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENFORCE THE SUBPENA IN THE INSTANT CASE.

Section 11(2) of the Act provides for United States District Court jurisdiction to enter orders requiring a party "to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . ."

Appellant has pointed out that since the Appellee seeks a list of names and addresses for the *sole* purpose of turning it over to the union, the thing it seeks is (1) not evidence, and (2) not related to a matter under investigation. Thus the district court was without jurisdiction to enter the order complained of. Appellee

---

[11]Page 15 of Appellee's Brief.

[12]See: *Montgomery Ward & Co. v. N.L.R.B.,* 377 F. 2d 452 (6th Cir. 1967) (Holding employee's refraining from answering questionnaire a "protected activity"); *Hunkin-Conkey Const. Co.,* 95 NLRB No. 56 (1951) Holding that an employee's refraining from attending a meeting was "protected activity"); *contra: N.L.R.B. v. Beach-Nut Life Savers, Inc.,* 274 F. Supp. 432 (S.D. N.Y. 1967).

has argued that its subpena power is broad and in this connection has relied upon a number of court decisions, none of which are in point.

N.L.R.B. v. Northern Trust Co., 148 F. 2d 24 (7th Cir. 1945) upheld the validity of a subpena which sought financial information about an employer so the *Board could use it* to determine the threshold *issue* present in any Board proceeding of whether the business operations of the employer meet the jurisdictional standards of the Board.

N.L.R.B. v. Duval Jewelry Company of Miami, Inc., 357 U.S. 1 (1958) has nothing whatever with the validity of a subpena or the class of material which can be subpenaed.

In *Cudahy Packing Company v. NL.R.B.,* 177 F. 2d (10th Cir. 1941), the court enforced a subpena for the employer's payroll records concerning employees in the bargaining unit. The records contained the names of employees which were needed by the Board to decide the issue of voting eligibility. As the court stated: "It [the Company] does not, nor could it, contend that the evidence sought by the Board does not relate to the subject under investigation." (117 F. 2d at 693).

In *N.L.R.B. v. C.C.C. Associates, Inc.,* 306 F. 2d 534 (2d Cir. 1962), the Board subpenaed data to determine whether a corporation was a successor to another corporation so as to incur the latter's back pay liability.

N.L.R.B. v. United Aircraft Corporation, 200 F. Supp. 48 (D. Conn. 1961), *aff'd.,* 300 F. 2d 442 (2d Cir. 1962), involved a subpena for employment records which might indicate whether the employer unlawfully discriminated against strikers.

The Board cites *N.L.R.B. v. Friedman,* 352 F. 2d 545 (3d Cir. 1965) to support its contention that

subpenaed information can be turned over to the union. In that case the Board sought certain records of the employer in order to prove that the employer had discriminatorily transferred some of its operations. The employer defended on the grounds that the Board intended to use a union accountant and economist to aid it in analyzing these records. The court found, however, that the garment industry was exceedingly complex and that the Board itself had no experts capable of analyzing the records. Furthermore, the only experts in the entire county were employed by either the employer, its competitors or the union. Under these unusual circumstances, the court enforced the subpena and allowed the use of a union expert by the Board.

The *Friedman* case is obviously distinguishable on these points: (1) the subpenaed material was probative of an *issue* to be decided by the Board and was thus clearly "evidence"; (2) the information was to be *used by the Board,* while in the instant case it will be simply turned over to the union for its own use; and (3) since the union was the "charging party" in the *Friedman* case, *it could have subpenaed the material itself.*

The narrowness of the court's holding in *Friedman* is further demonstrated by the scope of its order. The union accountant and economist was forbidden to reveal the information to anyone except to counsel for the preparation of the unfair labor practice case. The names and addresses of all customers and supplies were also deleted before the records were shown to the union expert. The court added that any deviation from these limitations would be subject to contempt. The *Friedman* case therefore stands for the proposition that such subpenaed information may not be turned over to the union for its own use, but rather may be given to a union for the purpose of analysis, subject to an ap-

propriate protective order, to aid the Board where such aid is absolutely necessary.

In each one of these decisions relied upon by the Board, it is obvious that the subpenas in issue (1) *sought only "evidence" in the conventional sense;* (2) *to be used by the Board;* (3) *to enable it to decide issues before it.* None of them lend any support for the validity of the subpena sought to be enforced here. In fact, since the subpena sought to be enforced in the instant case (1) does not seek "evidence" in a conventional sense; (2) seeks nothing to be used by the Board; (3) to enable *it* to decide any issue before it, the subpena in the instant case is, under the authority of these decisions, unenforceable.

Although both the Fourth and Seventh Circuits in *Hanes* and *Rohlen* have held that there is United States district court jurisdiction to enforce a subpena calling for the names and addresses of an employer's employees, it is respectfully submitted that those decisions are wrong. They are wrong for the simple reason that they have overlooked the fact that the thing ordered to be produced just does not tend to prove, or disprove, or in any other manner, relate to any issue or question to be decided by the Board. The only "matter under investigation" or "in question" at the election stage of these proceedings is whether or not a majority of employees desire to be represented for purposes of collective bargaining by the union. This "matter under investigation" or "in question" is decided *solely* by the ballots cast by the employees. It is not decided by a list of names and addresses. Thus the list does not constitute evidence touching the "matter under investigation" or "in question".

III.

THE DISTRICT COURT IMPROPERLY FOUND THE PRESENCE OF JURISDICTION UNDER 28 U.S.C., §1337.

Appellant has pointed out that United States District Court jurisdiction is specifically limited by statute in representation and unfair labor practice cases.

Where jurisdiction is specifically limited by statute or judicial authority[13] jurisdiction will not be found to exist by virtue of general language in the same or another statute. This rule of construction is clearly stated in *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204 (1932), where the court pointed out:

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. United States v. Chase, 135 U.S. 255, 260. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling. Kepner v. United States, 195 U.S. 100, 125. In re Hassenbusch, 47 C.C.A. 177, 108 Fed. 38. . . . United States v. Peters (D.C.), 166 Fed. 613, 615. . . ."

One of the best illustrations of this principle decided by this circuit is found in *In re Judith Gap Commercial Co.,* 5 F. 2d 307 (9th Cir. 1925). In that case the District Court held that it had jurisdiction to remove a trustee in bankruptcy, upon its own motion. It was argued that such jurisdiction existed under the inherent equity powers of the court and Section 2 of

---

[13]The respects in which United States District Court jurisdiction is so limited are discussed at pages 14-17 of Appellant's opening brief.

the Act of 1898 which provided that nothing in that section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not therein enumerated.

Yet this court turned to another portion of Section 2 of the Act of 1898 which specifically provided for United States District Court jurisdiction to ". . . upon the complaints of creditors, remove trustees for cause. . . ." This court held that jurisdiction to remove trustees was limited by the specific portion of the statute to removal upon complaints of creditors. It held that there was no jurisdiction to remove a trustee upon the court's own motion. Thus the decision of the district court was reversed.

The cases cited by Appellee are not in point for the plain reason that in no such case did the question of whether the provisions of a specific portion of the National Labor Relations Act preclude relief under 28 U.S.C. §1337.

Capital Service Inc. v. N.L.RB., 347 U.S. 501 (1954) involved an injunction by a United States District Court enjoining a state court proceeding where the injunction was "necessary in aid of its jurisdiction" and hence expressly authorized by 28 U.S.C. Section 2283.

N.L.R.B. v. New York State Labor Relations Board, 106 F. Supp. 749 (S.D.N.Y. 1952) was an action in aid of the Board's exclusive jurisdiction. It did not even involve 28 U.S.C. Section 1337.

Federal Maritime Commission v. Atlantic & Gulf/ Panama Canal Zone, 241 F. Supp. 766 (S.D.N.Y. 1965), also involved §1337, but there was no issue as to whether it applied to the case. The main issue was whether a court could issue an injunction to aid an ad-

ministrative agency even though there was no express authorization for such an injunction.

In short, Section 11 of the Act deals *specifically* with the jurisdiction of United States District Courts to enforce subpoenas. Jurisdiction either exists under this section, or it does not. If it does not, Appellee cannot come into court through the back door by relying upon the general terms of another statute.

IV.
CONCLUSION.

Since (1) the court below was without jurisdiction to enter the order appealed from, and (2) the *Excelsior* rule is invalid as applied to the facts of this case because (a) it violates the constitutional rights of appellant and its employees, and (b) it violates the statutory rights of appellant's employees, the decision of the court below should be reversed.

Dated: May 10, 1968.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON,

DAVID A. MADDUX,

Attorneys for Appellant British Auto Parts, Inc.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. MADDUX